CONSTITUTIONAL PROBLEMS PRESENTED BY THE ORGANIZED CRIME CONTROL ACT OF 1970

INTRODUCTION

The Impact of Organized Crime on American Society

> Today, organized crime has deeply penetrated broad segments of American life. . . .[T]he organized criminal relies on physical terror and psychological intimidation, on economic retaliation and political bribery, on citizen indifference and governmental acquiescence. He corrupts our governing institutions and subverts our democratic processes. For him, the moral and legal subversion of our society is a life-long and lucrative profession.[1]

Organized crime, like a giant spider web of illicit activity, criss-crosses the nation intricately carving out criminal satrapies at the expense of all legitimate enterprise. Its overt illegal operations in the areas of gambling and narcotics reveal but the top of the iceberg in comparison to organized crime's far-reaching effect into legitimate areas of economic, social, and political concern.[2] Organized criminal activity, though, is an illusory concept. The difficulties that law enforcement agencies and legislators have had in attempting to distinguish organized crime from other manifestations of crime (or for that matter from every other citizen who comes into contact with the law) have contributed to the frustrations of those groups attempting to combat organized crime and to the vitality of the crime syndicate.[3] If the phenomenon of organized crime can be described at all, it must be defined as a loosely connected group of regional criminal cartels that monopolize criminal enterprises in that region, not as a collection of specific illegal ventures but as a continuous plan of long-term illegal activity.[4]

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[1] President Richard Nixon's message relative to the fight against organized crime in the *Hearings on S. 30 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 444 (1969) [hereinafter cited as *Senate Hearings*]. In 1966, former President Johnson initiated the intense study of organized crime by observing in his "Special Message on Crime":

> The most flagrant manifestation of crime in America is organized crime. It erodes our very system of justice. . . . It is intolerable that corporations of corruption should systematically flaunt our laws.

112 CONG. REC. 5146 (daily ed. March 6, 1966).

[2] *See* THE CHALLENGE OF CRIME IN A FREE SOCIETY A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 187-91 (1967) [hereinafter cited as THE CHALLENGE OF CRIME IN A FREE SOCIETY]. Wilson, *The Threat of Organized Crime: Highlighting the Challenging New Frontier in Criminal Law*, 46 NOTRE DAME LAW. 41, 42 (1970). [hereinafter cited as Wilson, *The Threat of Organized Crime*].

[3] *Senate Hearings* at 240. The longevity of organized crime can also be attributed to the flexibility of its operation, being able to swiftly and efficiently alter emphasis as economic conditions change or as legal attacks become close. Wilson, *The Threat of Organized Crime*, *supra* note 2.

[4] Wilson, *The Threat of Organized Crime*, *supra* note 2. For an excellent account of the crime syndicate's organization, *see* THE CHALLENGE OF CRIME IN A FREE SOCIETY 191-96 (1967).

The great strength of organized crime lies in its ability to insulate itself from the operation of law enforcement and thereby evade the legal process.[5] The organization uses its great wealth to influence and infiltrate legitimate business, making the apprehension and punishment of the leaders of the illegal enterprises most difficult.[6] Furthermore, it uses its great financial empire to corrupt local political and law enforcement officials who in return allow organized criminal activity to flourish in their locales.[7] These factors result in probably the greatest threat of organized crime—the intolerable degree of immunity from legal accountability that creates a demoralizing effect upon the citizens of the country, especially in the urban centers where lawlessness seems to be rewarded, and attacks the integrity and credibility of the legal system.[8]

Law enforcement's ability to deal with organized crime has been comparable to attempts to extinguish a forest fire with a garden hose. However, it is generally recognized that substantive criminal law applicable to organized crime activity is adequate.[9] The problems that law enforcement agencies face in combating organized crime include three areas: (1) defects in the way that evidence is gathered, resulting in the acquittal of many professional criminals for lack of evidence; (2) lack of nationwide coordination among the different levels of government in the law enforcement area; and (3) lack of adequate resources (financial) to devote to breaking the power of organized crime.[10] Paramount among these considerations is the difficulty in gathering evidence against the power of a professional criminal organization which efficiently conceals its illegal activities from the "primitive" investigative methods of law enforcement. The Congress, perceiving the need for some sort of legislation to enable law enforcement to meet the challenge of organized crime in the United States, enacted the "Organized Crime Control Act of 1970" with the expressed purposes to strengthen the legal tools in the evidence-gathering process, to establish new penal prohibitions, and to provide enhanced sanctions and new remedies to deal with the unlawful activities of professional criminals.[11]

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[5] Wilson, *The Threat of Organized Crime*, *supra* note 2, at 44.

[6] For examples of racketeers operating legitimate businesses against the public interest, *see Hearings on S. 30 Before the Subcomm. No. 5 of the House Committee on the Judiciary*, 91st Cong., 2nd Sess. 433-36 (1970) [hereinafter cited as *House Hearings*].

[7] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 6 (1967) [hereinafter cited as T F R ON ORGANIZED CRIME].

[8] McClellan, *The Organized Crime Act (S. 30) or its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55, 60 (1970) [hereinafter cited as McClellan, *The Organized Crime Act*]; Wilson, *The Threat of Organized Crime*, *supra* note 2, at 43.

[9] Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis*, T F R ON ORGANIZED CRIME, Appendix C 80, 81 (1967); *See also Senate Hearings* 112 (1969). The additional criminal prohibitions created by the Act are more in the way of attempts to provide greater sanctions for organized criminal activity, *See* Titles VIII, IX, X, *infra.*

[10] T F R ON ORGANIZED CRIME 14-16 (1967).

[11] 84 STAT. 922 codified in scattered sections of 18, 28 U.S.C. [hereinafter cited to U.S.C.A.].

General Comments on the "Organized Crime Control Act of 1970"[12]

The Organized Crime Control Act represents a "conglomerate" of bills introduced in Congress to facilitate the assault upon syndicated crime.[13] With the exception of Title XII (The National Commission on Individual Rights) and Title XI (Regulation of Explosives), which could tangentially be connected to organized crime's enforcement methods, the other ten titles of the Act systematically attempt to strengthen law enforcment's ability to combat the criminal establishment by attacking the crime syndicate's major sources of power and capacity to evade the legal process.[14] Such a broad and extensive treatment of the vast and complicated problem of organized crime is undoubtedly warranted. But the sweeping scope of the remedies gives rise to a series of criticisms aimed at the Act's effects on legitimate activity.

The basic criticism leveled at the Act as a whole is that it goes beyond the scope of attacking the phenomenon of organized crime and into areas that either were not intended to be affected or should not be affected by the stringent measures of the Act.[15] It is argued that a "shotgun" approach denotes hasty legislative action toward a very complicated group of legal problems.[16] Possibly the source of this lack of specification comes from the failure of Congress to create a functional definition of organized crime to guide the various facets of the Act. This omission may reflect the complexity of delineating the various manifestations of organized crime into a succinct definition. But the lack of a definition contributes to the problem

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[12] The scope of this note deals primarily with the constitutional issues raised by selected Titles of this Act. Other considerations of policy and other non-constitutional arguments will be discussed either in conjunction with certain constitutional questions or not at all.

[13] McClellan, *The Organized Crime Act*, *supra* note 8, at 57. The structure of many of the Titles of the Act follows closely the recommendations of the President's Commission on Law Enforcement and Administration of Justice. *See* THE CHALLENGE OF CRIME IN A FREE SOCIETY 200-09 (1967).

[14] The first seven Titles of the Act focus on remedying some of the difficulties in the evidence gathering process by authorizing special grand juries to investigate and to issue reports on organized crime's activity (Title I); by providing a general federal immunity statute for witnesses (Title II); by dealing with witnesses who refuse to testify (Title III); by punishing witnesses who knowingly make false declarations (Title IV); by protecting government witnesses from intimidation by organized crime (Title V); by allowing depositions of witnesses to be taken by the government and used in court (Title VI); and by providing special procedures when litigation arises concerning sources of evidence (Title VII). Title VIII includes provisions to deal with interstate gambling syndicates—organized crime's greatest source of revenue. Title IX represents an imaginative approach to racketeering influence and the infiltration of legitimate business by organized crime. Title X deals with increased sentences for the habitual or dangerous offender and the professional criminal.

[15] ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE PROPOSED ORGANIZED CRIME CONTROL ACT OF 1969 (S. 30) 5-8, May 12, 1970 [hereinafter cited as A B C N Y REPORT]; 116 CONG. REC. S422 (daily ed. Jan. 22, 1970) (ACLU Letter on S. 30 to tthe Senate); Dissenting View of Representatives Conyers, Mikva, and Ryan, H.R. REP. NO. 1549, 91st Cong., 2nd Sess. (1970).

[16] The argument of overbreadth in legislative drafting, especially in the criminal area, has constitutional overtones. The constitutional arguments with regard to the vagueness issue will be explored in the discussion of the separate Titles when appropriate.

of overinclusive applicability in the Act because it is not clearly known to what exact conduct the legislative scheme of the Act is directed. Furthermore, a congressional formulation of the concept of organized crime would aid law enforcement and other governmental agencies at all levels in identifying the problem. The result of overinclusion in criminal law is the possibility of abusive assaults on individual liberties. The severest critics of the Act reject solutions to organized crime that carry with them seeds of official repression by sacrificing basic rights.[17]

In defense of the broad application of the Act, the designation of organized crime is but a "shorthand method of referring to a large and varying group of criminal offenses committed in diverse circumstances."[18] The difficulties in drafting acceptable legislation exclusively applicable to organized crime are, of course, overwhelming. The standard of segregation would have to meet the equal protection criteria while the process of application would have to be within due process of law. In many situations, especially in the investigatory provisions of the Act, organized crime's involvement in certain activity is more in the way of a conclusion than criteria to initiate an investigation.[19] Moreover, the focus of the sponsors of the Act was directed in each Title to balance the seemingly competing demands of crime control and individual rights, allowing when needed some form of procedural safeguards to protect individual liberties by keeping the provisions within constitutional mandates.[20] Senator McClellan and the other sponsors of the Act perceived the demand for immediate action to curtail the power of organized crime. They acted to fashion a comprehensive solution to the entire problem by attempting to create a well-integrated legislative program.

In connection with the other titles in the Act, the legislation provided that two national investigatory commissions be established: (1) to study individual rights and (2) to review national policy toward gambling. Title XII created the National Commission on Individual Rights to include representatives from the Congress and from all segments of life in the United States. During its six year tenure the Commission is to explore federal laws and practices to determine which are effective and which infringe upon the individual rights of citizens. Special study and review is ordered for the areas of special grand juries (Title I), dangerous special offender sentencing (Title X), and other recent legislative reform in the criminal law area such as wiretapping, bail, preventive detention, no-knock search warrants, and the accumulated files of certain individuals by governmental agencies. Such a commission is needed to study the alleged ero-

[17] *Supra* note 15.

[18] McClellan, *The Organized Crime Act, supra* note 8, at 61.

[19] *Id.* at 62.

[20] "We must seek . . . and achieve a practical reconciliation of the need to preserve our substantial rights. . . ." *Id.* at 200.

sion of constitutionally guaranteed rights by recent legislation designed to aid law enforcement in pursuing the criminal element of society. It is hoped that the Commission's function will include strong recommendations concerning the disposition of various laws that prove over time to be ineffective or that cut too deeply into the individual liberties of each citizen. If extended to other innovative measures that tread dangerously close to the suppression of individual rights, this concept of reviewing the operation of legislation could become the most significant development of the Act.

A Commission on the Review of the National Policy Toward Gambling is created in Part D of Title VIII. The Commission of fifteen members, eight appointed by the President, will come into existence two years after the effective date of the Act. The Commission will review (1) the effectiveness of existing policy and practices and (2) the existing statutes that prohibit gambling activities. A final report to the President and to the Congress is due within the four year period following the effective date of the establishment of the Commission. Further, the Commission may hold hearings and is given broad investigatory and subpoena powers. Also, "The Commission is regarded as 'an agency of the United States' under subsection (1), section 6001, title 18, United States Code, for the purpose of granting immunity to witnesses."[21] Although the President's Commission on Law Enforcement and Administration of Justice did not specifically recommend a commission on gambling, it did recommend "A permanent joint congressional committee on organized crime."[22] The commission on gambling goes a long way toward meeting this recommendation since gambling is the greatest source of revenue for organized crime and in the words of the President is the "lifeline of organized crime."[23] A commission on gambling, therefore, if it pursues its task with vigor, may prove to be a very useful tool in the fight against organized crime.

TITLE I—SPECIAL GRAND JURY[24]

Additional federal grand juries are created under the provisions of this Title in districts containing four million or more inhabitants or in districts where the Attorney General has reason to believe that the criminal activity warrants special attention. Such special grand juries are empowered to investigate alleged violations of federal criminal laws and return indictments.[25] Additionally, the statute allows the special grand jury to issue re-

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[21] 18 U.S.C.A. § 1955 (Supp. 1971).

[22] T F R ON ORGANIZED CRIME 22 (1967).

[23] 115 CONG. REC. § 12355 (daily ed. Oct. 13, 1969).

[24] For purposes of discussion in the text, references will be made to 18 U.S.C. § 3331-3334, inclusive.

[25] Section 3331(a) also sets the duration of the special grand jury at 18 months with provisions for court-ordered extensions for a maximum of 36 months or earlier dissolution if the jury

ports, regarding either organized crime conditions in the district or the noncriminal misconduct involving organized crime of appointed public officers or employees (including state and municipal), providing a basis for recommending dismissal or disciplinary action. In conjunction with the reporting power of the special grand jury, provisions are made to review the scope and basis of the report by the district court and to provide a number of ways in which a person accused of noncriminal misconduct may present an answer to the report before it is disclosed to the public. The reporting powers of the special grand jury, especially in the area of noncriminal misconduct, represent the focal point of constitutional controversy in Title I.

Historically, grand juries have been given very broad powers of investigation into criminal activity. Courts have noted that a grand jury is competent to act solely on its own volition to inquire whether a crime has been committed.[26] At common law the grand jury's function was not only to return indictments concerning criminal activities but also "to keep the King in touch with the affairs of each community."[27] In that way and others the group of impartial citizens comprising the grand jury acted as a buffer between the citizenry and the central government. The common law grand jury in England had the power to issue reports; but as the institution of the grand jury developed in this country, the reporting power of the grand jury was severely curtailed by the courts.[28]

The reporting provisions of Title I further the goals of exposing organized crime's influence in a community and of discovering evidence to be used to destroy organized crime's power.[29] However, the basis for the actual procedural aspects of the reporting power and the safeguards to in-

determines by a majority vote that its business is completed. Furthermore, if the district court fails to extend the term before the special grand jury determines that it has completed its business, the jury by a majority vote may ask the chief judge of the circuit to extend the term (§ 3331(b)). Finally, § 3332(b) directs the district court to impanel additional special grand juries if the court finds that the volume of business exceeds the capacity of one jury.

[26] Hale v. Henkel, 201 U.S. 43, 60, 65 (1906); *accord*, Blair v. United States, 250 U.S. 273, 282 (1919); United States v. Harte-Hanks Newspapers, 254 F.2d 366, 369-70 (5th Cir. 1958), *cert. denied*, 357 U.S. 938 (1958) (the broad power to conduct investigations is fettered only by the requirements of constitutional rights); *In Re* Grand Jury Investigation, 32 F.R.D. 175 (S.D.N.Y. 1963); *appeal dismissed*, 318 F.2d 533 (2d Cir. 1963), *cert. denied*, 375 U.S. 802 (1963).

[27] McClellan, *The Organized Crime Act*, *supra* note 8, at 64. For a good summary and history of the development of the modern day grand jury, *see* Blakey, *supra* note 9, at 83.

[28] *See* Kuh, *Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1103, 1105-1110 (1955); Application of United Electrical, Radio, and Machine Workers, 111 F. Supp. 858, 863 n.12 (S.D.N.Y. 1953); *In Re* Petition for Disclosure, 184 F. Supp. 38 (E.D. Va. 1960). *But see*, *In Re* Presentment of Camden County Grand Jury, 10 N.J. 23, 89 A.2d 416 (1952); *In Re* Report of Grand Jury, 11 So.2d 316 (Fla. 1943). For a good summary of policy considerations involved in grand jury reporting, *see* Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590 (1961).

[29] THE CHALLENGE OF CRIME IN A FREE SOCIETY 200 (1967). For other purposes of the special grand jury reports, *see* Blakey, *supra* note 9, at 84; McClellan, *The Organized Crime Act*, *supra* note 8, at 77, 82 (the reporting provisions are an effective and fair means of improving the quality of government).

dividuals criticized in the reports is derived from a New York statute.[30] The complexities of the policy considerations and the constitutional implications that underlie grand jury reporting power are illustrated by the New York experience with grand jury reports. In *Jones v. People*,[31] the Supreme Court of New York upheld a grand jury's power to report on specific instances of noncriminal misconduct of identified individuals on the basis of the grand jury's exercise of its common law inquisitorical powers. However, a strong dissent argued that the grand jury by submitting the report had gone beyond the two great purposes of a grand jury (to bring to trial those properly charged with a crime and to protect citizens against unfounded accusations of crime) to administer punishment in the way of public censure without the right to answer and without the opportunity to have a judicial forum determine the truth or falsity of the attack.[32] The disposition of the case by the New York Court of Appeals[33] left the question of grand jury reporting power uncertain, but the reasoning of the dissent was generally followed in New York[34] and used in other jurisdictions to justify a restrictive view of the reporting powers of grand juries.[35] In *Wood v. Hughes*,[36] the New York Court of Appeals struck down the power of a grand jury to report on misconduct charges involving public officials when no evidence was uncovered warranting an indictment. Utilizing the basic reasoning of the dissent in *Jones*,[37] the court analogized accusation by report to accusation by indictment, declaring that in the public mind accusation by report subjected a public official to the same condemnation and opprobrium as if he had been indicted without according him the benefit of protections accorded someone who is indicted.[38] However, this statement of the law was changed by the enactment of § 253-a which became the model for the reporting provisions of Title I.[39]

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[30] N.Y. CODE OF CRIM. PROCEDURE § 253-a (McKinney Supp. 1971). For other states with grand jury reporting powers similar to New York, *see* McClellan, *The Organized Crime Act*, *supra* note 8, at 64 n. 42. The drafters of the reporting section also relied heavily upon the reasoning of *In Re Presentment of Camden County Grand Jury*, 10 N.J. 23, 89 A.2d 416 (1952) (opinion of Chief Justice Vanderbuilt).

[31] 101 App. Div. 55, 92 N.Y.S. 275 (2nd Dept. 1905), *appeal dismissed*, 181 N.Y. 389, 74 N.E. 226 (1905).

[32] *Id.* at 59, 92 N.Y.S. at 277.

[33] *In Re* Jones, 181 N.Y. 389, 74 N.E. 226 (1905).

[34] *E.g.*, People v. McCabe, 148 Misc. 330, 333-34, 266 N.Y.S. 368 (Sup. Ct. 1933).

[35] *See* Kuh, *supra* note 28, at 1105; *accord*, Application of United Electrical, Radio, and Machine Workers, 111 F. Supp. 858 (S.D.N.Y. 1953).

[36] 9 N.Y.2d 144, 173 N.E.2d 21, 212 N.Y.S.2d 33 (1961).

[37] A report is ". . . a moral condemnation or exhortation without any forum being provided for explanation or defense." *Id.* at 148 n.1, 173 N.E.2d at 22 n.1, 212 N.Y.S.2d at 34 n.1.

[38] *Id.* at 154, 173 N.E.2d at 26 212 N.Y.S.2d at 39-40. For an example of the possible harsh repercussions of a grand jury report, *see* A B C N Y REPORT 11 (1970). For an exploration into the various elements involved in the investigation of an individual resulting in condemnation and opprobrium problems, *see* Note, *The Effect of Public Opprobrium on Investigative Due Process*, 22 S. C. L. REV. 392, 401-06 (1970).

[39] *In Re* Grand Jury, 52 Misc. 2d 895, 277 N.Y.S.2d 105 (Sup. Ct. 1967), involved a re-

A constitutional consideration of the reporting power of special grand juries must begin with an exploration of the outer limits of the fifth amendment due process clause in the area of investigatory bodies. Neither the New York statute nor 18 U.S.C.A. § 3333 affords a public official accused of noncriminal misconduct in office the full panoply of procedural safeguards to which a defendant in a criminal trial is entitled.[40] Although the concepts of fundamental fairness and ordered liberty have been generally equated with the constitutional requirements of due process of law,[41] the substantive rights encompassed by procedural due process are vacillating and the application of a particular right in a specific proceeding depends upon a complexity of factors: the nature of the right, the nature of the proceeding, and the possible effect of that right on the proceeding.[42] Usually, fundamental fairness in an adjudicatory *qua* criminal context required the basic rights to confront and cross-examine witness,[43] to present evidence,[44] and to consult with counsel.[45] The same basic rights have been

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port under the provisions of § 253-a that was reviewed and rejected as not within the statute. The case, however, was not decided on any constitutional grounds. There are several important distinctions between § 3331 and § 253-a. The New York law in § 253-a(1) provides for three instances in which grand jury reports are proper: (1) concerning non-criminal misconduct, nonfeasance, or neglect of a public officer or employee; (2) exonerating a public officer or employee from charges of non-criminal misconduct; (3) recommending legislative, executive, or administrative action in the public interest as long as the report is not critical of an identified or identifiable person. Section 3331(a) limits the bases for reports by providing only two grounds: (1) regarding non-criminal misconduct, *malfeasance*, or *misfeasance involving organized crime* by an *appointed* public officer or employee; (2) concerning organized crime conditions in the district as long as the report is not critical of an *identified person* (emphasis added). The changes in § 3331(a)(1) are significant in that they reflect an attempt on the part of the drafters of Title I to limit the application of the non-criminal misconduct reports to a degree of willful misconduct (not negligent behavior) with organized crime and to eliminate references to elected officials in any report. The deletion of the word *identifiable* in § 3331(a)(2) from the model was not intended by the drafters of the Act to be a material departure. Rather, the word identified is to be read broadly to include not only identification by name but also by ordinary means by which an individual is clearly distinguished. It was thought that the word identifiable could be read so broadly as to eliminate the effect of the report provision on organized crime. *See* McClellan, *supra* note 8, at 75-76. Finally, § 253-a(2)(b) of the New York statute provides for examination of the report and the grand jury's minutes by a court before it orders the report accepted and filed as part of the public record to determine whether the grand jury's findings are supported by a preponderance of the *credible* and *legally admissible* evidence (emphasis added). Section 3331(b)(1) also directs court review of the report and minutes before acceptance and filing, but the standard of proof to be applied is only a preponderance of the evidence. Since federal grand juries are allowed to consider evidence not admissible at trial, hearsay evidence could be included as the basis of a report. *See* Costello v. United States, 350 U.S. 359 (1959).

[40] Letter from Will Wilson, Assistant Attorney General, to the Hon. Emanuel Cellar, Chairman, committee on the Judiciary, House of Representatives, July 23, 1970, as contained in H.R. REP. NO. 1549, 91st Cong., 2nd Sess. (1970).

[41] Rochin v. California, 342 U.S. 165 (1952); Palko v. Connecticut, 302 U.S. 319 (1937).

[42] Hannah v. Larche, 363 U.S. 420, 442 (1960).

[43] *E.g.*, Willner v. Committee on Character and Fitness, 378 U.S. 96,103-04 (1963); Greene v. McElroy, 360 U.S. 474, 496-99 (1959); *cf.* Pointer v. Texas, 380 U.S. 400 (1965).

[44] *E.g.*, Morgan v. United States, 304 U.S. 1, 18 (1938), Baltimore and Ohio R.R. Co. v. United States, 298 U.S. 349, 368-69 (1936).

[45] *Cf.* Gideon v. Wainwright, 373 U.S. 335 (1963).

held not to apply to a nonadjudicatory, fact-finding investigation conducted by a body like a grand jury.[46] The situation is complicated, however, when a supposedly investigatory body takes on characteristics of adjudication and hence, requirements of procedural due process are made applicable.[47]

The cases of *Hannah v. Larche*[48] and *Jenkins v. McKeithen*[49] point out the difficulties in attempting to determine when an investigatory body is sufficiently adjudicatory in nature to warrant the requirements of procedural due process in its proceeding. In *Hannah* the Civil Rights Commission created by the Voting Rights Act of 1957[50] was declared by the Supreme Court of the United States to be investigatory in nature over objections that the investigation would result in irreparable harm to those investigated with the likelihood of the loss of their jobs. The Court determined that since the Commission made no findings of civil or criminals liability, no orders, no indictments, and no imposition of punishment or other legal sanctions (in effect, it took no affirmative action on individual's rights), its conclusions were not "depriving anyone of life, liberty, or property" requiring the application of procedural due process rights.[51] In *Jenkins*, the Court held that a state investigatory commission, limited in scope to inquiries into violations of criminal law, was in reality exercising a function not unlike an official adjudication of criminal culpability, publicly branding the named individual as criminal.[52] Both cases used the

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[46] Hannah v. Larche, 363 U.S. 420, 446, 449 (1960). "A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other investigatory bodies." *In Re* Groban, 352 U.S. 330, 333 (1957). *But see*, People v. Ianniello, 21 N.Y. 2d 418, 235 N.E.2d 439, 288 N.Y.S.2d 439 (1968) (a witness testifying in front of a grand jury can leave the room at any time to consult with counsel regarding his legal rights); United States v. Capaldo, 402 F.2d 821 (2d Cir. 1968).

[47] Generally, an adjudicatory body makes findings of fact that serve as a basis for the imposition of official sanction or other action affecting a substantive right. On the other hand, an investigatory body makes fact-findings that serve either a strict informing and reporting function or a pre-prosecutorial, accusatory function. 72 YALE L.J. 1227, 1229-30 (1963). However, the occasional dual role of an "investigatory" body as a fact-finder and reporter and as an accuser blurs whatever distinction there may have been under the investigatory-adjudicatory analysis.

[48] 363 U.S. 420 (1960).

[49] 395 U.S. 411 (1969), *reh. denied*, 396 U.S. 869 (1969). Both *Hannah* and *Jenkins* dealt with procedural due process in the context of an administrative proceeding and only mentioned grand juries as a reference point.

[50] 42 U.S.C.A. §§ 1975-1975(e).

[51] 363 U.S. at 420, 411 (1960).

[52] 395 U.S. at 411, 427-428 (1969). "Were the Commission exercising an accusatory function, were its duty to find named individuals were responsible . . . and to advertise such finding . . . , the rigorous protection relevant to criminal prosecutions might well be the controlling starting point for assessing the protection which the Commission's procedure provides." *Hannah v. Larche*, 363 U.S. 420, 488 (1960) (concurring opinion of Mr. Justice Frankfurter). It has been suggested that the public opprobrium problems inherent in investigations could be solved by either providing the accused the opportunity to rebut the finding of the investigation or maintaining strict control over the gathered information from reaching the public. 22 S. CALIF. L. REV. 392, 406-10 (1970); 72 YALE L.J. 1227, 1239 (1963).

example of the grand jury as a focal point characterizing an investigatory body. The Court stated that grand juries only investigated and reported and had no adjudicative function. Such a characterization of grand jury activity justified the lack of the rights of cross-examination and confrontation usually essential to the fundamental fairness of procedural due process because the guarantees of due process require greater safeguards for an individual in an adjudicatory proceeding than in an investigatory proceeding.

Special grand jury reports on organized crime conditions in a district are basically investigatory in nature and do not seem to be offensive to constitutional standards of procedural due process as long as the reports are not critical of an *identified* person.[53] However, difficulty arises in characterizing special grand jury reports when the reports concern non-criminal misconduct of an appointed public official or employee involved with organized crime. Although the individual accused of the misconduct is accorded procedural safeguards such as the right to be notified of the charges in the report before public disclosure, the right of the accused and a reasonable number of his witnesses to testify before the grand jury prior to the filing of the report, the right to answer in writing the charges and to have that answer included as an appendix to the report, and the right to appeal a judicial finding that the report is within the statutory limitation, the hearings that precede the special grand jury's conclusion are *ex parte* and the accused has neither the right to confront his accusors or to cross-examine adverse witnesses. Unlike a grand jury indictment that can lead to a judicial forum to determine the guilt or innocence of the accused, a report on non-criminal misconduct is only a basis for a recommendation of removal or disciplinary action.[54]

The use of hearsay evidence by federal grand juries amplifies the problems of assuring fundamental fairness, which are involved in the lack of a judicial forum to vindicate charges of complicity with organized crime.[55]

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[53] Application of United Electrical, Radio and Machine Workers, 111 F. Supp. 858, 863 n. 12 (S.D.N.Y. 1953) (grand juries at common law had the power to issue reports on general conditions but there was uncertainty over censuring individuals); 56 VA. L. REV. 487, 496 (1970) (where there is no determination made concerning specific persons, there is no necessity for constitutional safeguards). Although the use of hearsay evidence by federal grand juries may present a problem for other grounds of reporting, it would seem that the fairness of reports on organized crime conditions in a district would not be affected by the use of hearsay declarations. *Contra*, Kuh, *supra* note 28, at 1126.

[54] In one sense such a report is punishment in the form of a public reprimand based upon an *ex parte* proceeding. Application of United Electrical, Radio and Machine Workers, 111 F. Supp. 858, 867 (S.D.N.Y. 1953). In administrative agencies the use of publicity as a device for punishment is widely used, *see* Rourke, *Law Enforcement Through Publicity*, 24 U. CHI. L. REV. 225 (1957).

[55] Costello v. United States, 350 U.S. 359 (1956); *cf* United States v. Blue, 384 U.S. 251 (1966). *But see, United States v. Umans*, 368 F.2d 725, 730 (2d Cir. 1966), *cert. dismissed as improvidently granted*, 389 U.S. 80 (1967), ". . . [W]e think . . . that excessive use of hearsay [by] . . . grand juries tends to destroy . . . the protection from unwarranted prosecutions that

If the keystone of a proper special grand jury report includes a concept of fairness that guarantees the rights of an accused to procedural safeguards, it would then seem that a report should be premised on legally admissible evidence and not hearsay, because a hearsay declaration in a report is not amenable to cross-examination.[56] The probable use of hearsay evidence in investigations of special grand juries and in reports on non-criminal misconduct multiply the difficulties of determining whether the provisions of 18 U.S.C.A. § 3333 are adequate under the circumstances to protect constitutional rights, or whether the doctrine of procedural due process requires more.

In a situation where an appointed public official or employee is accused and then found by a preponderance of the evidence before the special grand jury that he has perpetrated non-criminal misconduct involving organized crime, it is uncertain how the due process clause will be applied. The basic constitutional objection leveled at the special grand jury reporting procedure on non-criminal misconduct is that the accused is denied the right to cross-examine witnesses who testify at the special grand jury hearings. By traditional due process analysis the guarantees that have been considered required in a specific proceeding have been determined in reference to that proceeding's similarity to a criminal adjudication. The limitations of due process outside the criminal context have not been specifically delineated. Furthermore, the procedural due process analysis in *Hannah* and *Jenkins* has been based upon the characterization of the proceeding in question. In turn, the characterization of the proceeding has been based upon the stated function or purpose of the proceeding and upon the nature of the harm resulting from the proceeding's operation.

Such an accusation and finding by the special grand jury that an appointed official or employee has been involved in non-criminal misconduct involving organized crime are explicitly to be used as a basis for removal from office. A man's employment has been held to be included in the term property within the fifth amendment due process clause.[57] Governmental action that would deprive an individual of such property seriously injures that person and would seem to require the opportunity for cross-examination and confrontation to prove the accusations and findings as untrue.[58] Furthermore, from the investigatory-adjudicatory distinction

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grand juries are supposed to afford the innocent. Hearsay evidence should only be used when direct testimony is unavailable. . . ."

[56] Kuh, *supra* note 28, at 1126, n.96.

[57] Green v. McElroy, 360 U.S. 474 (1959); 56 VA. L. REV. 487, 496 n.68 (1970) (the right to employment has long been held within liberty and property concepts of due process).

[58] 56 VA. L. REV. 487, 496 (1970). There is also the consideration that by the time the accused has a right to appear and produce witnesses the jury has already made up its collective mind and the burden of persuading them to change is on the accused. H.R. REP. NO. 1549, 91st Cong., 2nd Sess. (1970).

as formulated in *Hannah v. Larche*,[59] it appears that a special grand jury report which may result in a public employee's dismissal because of some form of non-criminal misconduct connected to organized crime, is an affirmative act that can adversely affect an individual's rights.[60] But the language in *Jenkins v. McKeithen*[61] seems to imply that every accusatory body, especially a grand jury, is not required to provide all or some of the constitutionally guaranteed rights under the due process clause unless that body performs a function similar to a finding of criminal culpability. A special grand jury's report on non-criminal misconduct is distinguishable from the finding in *Jenkins* on the basis that it does not determine criminal guilt. Analytically, therefore, the reporting provisions of § 3333 fit neither the mold of *Jenkins* nor *Hannah* regarding the applicability of procedural due process rights. If the due process analysis were reduced to the criteria contained in *Hannah*, a decision may turn on the idea that the rights of cross-examination and confrontation may be too much of a burden on the investigatory proceedings of a special grand jury inquiry into organized crime, when there exist statutory procedural safeguards and judicial review of the report before its public disclosure. Such procedural safeguards may satisfy a less stringent standard of procedural due process than is required for the adjudication of criminal guilt. In any event, the right of an individual to the guarantees of procedural due process raises a substantial constitutional issue with regard to special grand jury reports that can only be resolved by judicial interpretation.

There are two other constitutional problems raised by the power of special grand juries to report on non-criminal misconduct of appointed public officers or employees. In all cases under § 3333(a)(1) a special grand jury must find that the public employee under investigation has committed non-criminal misconduct involving organized crime before a report on the activities of the employee can be made. In drafting the statute, special care was taken to assure that any inadvertent contact with organized crime would not cause a report to issue.[62] However, the statute provides no standards by which the crucial element of misconduct may be applied.[63] Such a contingency makes the statute amenable to constitutional objections on the ground that the term "misconduct" is vague and that a public employee really does not know and must guess at structuring his conduct so that he will not be susceptible to a derogatory report that may result in his dismissal.[64] In addition, the uncertainty is magnified by the lack of a reference to the term non-criminal in § 3333(a)(1). Although

[59] 363 U.S. 420 (1960).

[60] *Id.* at 441.

[61] 395 U.S. 411, *reh. denied*, 396 U.S. 869 (1969).

[62] H.R. REP. NO. 1549, 91st Cong., 2nd Sess. (1970).

[63] A B C N Y REPORT 10-11 (1970).

[64] *See* Screws v. United States, 325 U.S. 91 (1945).

a broad reading of non-criminal would include state and federal criminal offenses, the word could be interpreted in a restrictive sense to include crimes defined only by federal law. Even though such a construction is not very probable, the possibility of several different interpretations to the phrase "non-criminal misconduct" reveals that the constitutional mandate for definiteness in statutory language may be breached by § 3333(a)(1).[65]

Under article III of the Constitution, the nation's judicial power is allotted to the federal courts. It has been determined that such a grant of power does not include the prerogative of a court to invade areas that are reserved for the other branches of government.[66] Although a federal grand jury has great independence in many areas, it has still been considered an appendage of the court, having jurisdiction co-extensive with that of the court.[67] Special grand juries that have the power to issue reports on the conduct of appointed officials in other branches of government would appear to go beyond the judiciary's grant of power in article III and violate the separation of powers doctrine that courts have carefully guarded.[68] As a matter of logic, though, the reporting function given special grand juries in § 3333 (a) (1) is no more a violation of the concept of separation of powers than indicting a public official for criminal conduct in the performance of his duties; and the function of criticism by a special grand jury is analogous to a court noting statutory defects and suggesting amendments.[69]

Except for the constitutional difficulties inherent in Title I's reporting provisions, the creation of federal special grand juries can contribute to the national attack on organized crime by alerting the community to the activities of the professional criminal. The toleration for organized crime in America has resulted in part from an ignorance of its various operations in a specific community. The creation of special grand juries and their reporting power is directed to remedying that ignorance.

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[65] A construction that would cause special grand juries to make findings and issue reports on state defined criminal conduct would bring the statute closer to the subject litigated in *Jenkins v. McKeithen*, 395 U.S. 411, *reh. denied*, 396 U.S. 869 (1969).

[66] *See* United Public Workers v. Mitchell, 330 U.S. 75, 89-91 (1947).

[67] Brown v. United States, 359 U.S. 41 (1959); Application of United Electrical, Radio and Machine Workers, 111 F. Supp. 858, 864 (S.D.N.Y. 1953).

[68] United Public Workers v. Mitchell, 330 U.S. 75, 90-91 (1947); Application of United Electrical, Radio and Machine Workers, 111 F. Supp. 858, 864-65 (S.D.N.Y. 1953); *cf.* Alabama v. Arizona, 291 U.S. 286, 291 (1934).

[69] *Senate Hearings* 369. The Department of Justice comments also observed that in the case of the reporting function in § 3331(a)(1) the powers of a federal grand jury would be so changed that it would become an independent body to which the separation of powers argument would not apply. This characterization of the special grand jury's role in reporting non-criminal misconduct strengthens the arguments favoring the imposition of procedural due process requirements to that facet of special grand jury proceedings.

TITLE II—IMMUNITY

Title II establishes an immunity provision designed to replace more than fifty federal immunity statutes now in operation. The provision may be invoked in the case of any witness who

> . . . refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
> (1) a court or grand jury of the United States,
> (2) an agency of the United States, or
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part. . . .[70]

The immunity provided is as follows:

> . . . no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.[71]

The immunity provided by this provision is commonly referred to as "use immunity" or alternatively "testimonial immunity." Use immunity may be defined as a grant of immunity which prevents the use of the witness' testimony and its fruits from being used against the witness in any manner in connection with a criminal prosecution against him. This definition of immunity arises out of the Supreme Court decision in *Murphy v. Waterfront Commission*.[72] The proponents of Title II argue that *Murphy sub silentio* overrules an older Supreme Court decision, *Counselman v. Hitchcock*,[73] which laid down the rule as to "transactional immunity." Transactional immunity may be defined as ". . . absolute immunity against future prosecution for the offense to which the question relates."[74] Of course, the critics of Title II argue that *Counselman* has not been *sub silentio* overruled and that mere use immunity is constitutionally deficient since use immunity is not co-extensive with the fifth amendment privilege against self-incrimination.

The Supreme Court recently had an opportunity to resolve this conflict over immunity in *Piccirillo v. New York*.[75] However, the writ of certiorari was dismissed as improvidently granted. In a dissenting opinion concurred

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[70] 18 U.S.C.A. § 6002 (Supp. 1971).
[71] *Id.*
[72] 378 U.S. 52 (1964).
[73] 142 U.S. 547 (1892).
[74] *Id.* at 586.
[75] 400 U.S. 548 (1971).

in by Justice Marshall, Justice Brennan held that the federal government in a federal case must grant absolute transactional immunity.[76]

Two recent decisions in the federal courts dealing with Title II have reached opposite conclusions in resolving this issue. In *Stewart v. United States*,[77] the Ninth Circuit determined that Title II was constitutionally sound. In reaching the conclusion that use immunity was sufficient, the Court gave controlling weight to the following footnote in *Murphy*:

> Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.[78]

The Ninth Circuit concluded that the language of this footnote indicated ". . . that the [Supreme] Court does not believe that the immunized testimony must bar all *prosecution* for the 'transaction' about which he testified."[79]

It is noteworthy that the Ninth Circuit did not mention Justice Brennan's dissenting opinion in *Piccirillo* or the federal district court decision, *In Re Kinoy*,[80] reaching a contrary result to that of *Stewart v. United States*. In *Kinoy* the court determined that *Counselman v. Hitchcock* had not been *sub silentio* overruled by *Murphy v. Waterfront Commission*. Further, the court indicated that *Counselman* had been reaffirmed by a Supreme Court case subsequent to *Murphy*. A year after the *Murphy* decision, the Supreme Court decided *Albertson v. Subversive Activities Control Board*.[81] In *Albertson*, the Supreme Court measured the immunity provision before them against the standards mentioned in *Counselman*. One of the standards quoted was ". . . absolute immunity against future prosecution for the offense to which the question relates."[82] It would indeed appear then that the Supreme Court had reaffirmed the *Counselman* requirement for transactional immunity.

However, the Court in *Kinoy* failed to note that the Supreme Court subsequently reaffirmed the position taken in *Murphy* when it decided *Gardner v. Broderick*.[83]

> Answers may be compelled regardless of the privilege [against self-incrimination] if there is immunity from federal and state use of the

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[76] *Id.* at 522 (Brennan, J., dissenting).
[77] 440 F.2d 954 (9th Cir. 1971).
[78] 378 U.S. 52, 79 n.18 (1964).
[79] 440 F.2d 954, 957 (9th Cir. 1971).
[80] 326 F. Supp. 407 (S.D.N.Y. 1971).
[81] 382 U.S. 70 (1965).
[82] *Id.* at 80.
[83] 392 U.S. 273, 276 (1968).

> compelled testimony or its fruits in connection with a criminal prosecution against the person testifying.[84]

The citation to the *Counselman* case in support of the use immunity standard is puzzling but not all that surprising when one remembers that the *Counselman* case gave lip service to both immunity standards.

In *Stevens v. Marks*,[85] decided only two years before *Gardner v. Broderick*, the Court said:

> We need not stop to determine whether the immunity said to be conferred here—which merely prevents the use of the defendant's testimony or its fruits in any subsquent prosecution but, apparently, does not preclude prosecution based on "independent" evidence . . . —constitutes that "absolute immunity against further prosecution" about which the Court spoke in *Counselman v. Hitchcock* . . . and which the Court said was necessary if the privilege were to be constitutionally supplanted.[86]

In light of this language, it is difficult to conclude that the Court in *Gardner* meant to disavow the absolute immunity standard of *Counselman* when the Court did not specifically state such.

If anything is clear from the above analysis, it is that the decisions of the Supreme Court are not clear on this issue. There is language in these decisions supporting the notion that use immunity is constitutionally acceptable, but these same decisions have not disavowed the requirement of "absolute immunity" contained in *Counselman*.

Even assuming that use immunity is constitutionally adequate, it poses a serious problem in operation. Once a witness has testified under immunity he can only be prosecuted for the acts concerning which he has testified if the prosecution can establish ". . . an independent, legitimate source for the disputed evidence."[87] A defendant would be faced with a very difficult task to rebut the government's proof of "independent source." Further, such a requirement would result in an increased amount of litigation since a motion to suppress the evidence would be the inevitable result of the government's presentation of such evidence. Certainly, there are considerations to be taken into account when the courts pass upon the constitutionality of Title II's use immunity.

TITLE VI—DEPOSITIONS[88]

The enactment of Title VI is basically designed to preserve the testimony of witnesses by use of depositions in situations where organized crime has been known to use strong-arm methods to silence witnesses will-

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[84] *Id.* at 276.

[85] 383 U.S. 234 (1966).

[86] *Id.* at 244.

[87] Murphy v. Waterfront Commission, 378 U.S. 52, 79 n.18 (1964).

[88] 18 U.S.C.A. § 3503 (Supp. 1971).

ing to testify adversely to members of the crime syndicate.[89] Like Title V (Protested Facilities for Housing Government Witnesses), the ability to depose witnesses by the government will tend to eliminate the incentive to harass violently such witnesses.

Under federal law before Title VI, depositions in a criminal proceeding could only be taken by order of the court on a motion initiated by the defendant.[90] The Congress in § 3503 gave to the government (The Department of Justice) the power to depose witnesses in proceedings where there is reason to believe the defendant has participated in organized criminal activity. The Government, though, must prove that an exceptional situation exists which makes the deposition in the interest of justice.[91] In the process of taking a deposition, the provisions of § 3503 give to the defendant the right to be notified and present at the recording of the deposition, the right to be represented by counsel, the right to cross-examine the witness being deposed to the extent that would be allowed at trial, and the right to use any statement made by the witness prior to the deposition and in the possession of the government. Additionally, the defendant cannot be deposed against his will and hence, his fifth amendment right against self-incrimination is protected.

Until the decision in *California v. Green*,[92] there was a great deal of

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[89] McClellan, *The Organized Crime Act*, *supra* note 8, at 100; A B C N Y REPORT 24 (1970).

[90] FED. R. CRIM. P. 15. Such depositions are taken as a matter of judicial discretion, unlike depositions as a matter or right under FED. R. CIVIL P. 26(a) and 30. *Cf.* Wilson v. Bowie, 408 F.2d 1105 (9th Cir. 1969).

[91] Similarly, when the defendant wishes to depose one of his witnesses, he must prove that the deposition will prevent a failure of justice. FED. R. CRIM. P. 15(a). The standard for the government to depose a witness seems to be more restrictive because it must prove that the situation is of such exceptional nature as to warrant the deposition in the interest of justice. Other major similarities between § 3503 and Rule 15 include instances when a deposition may be admitted in whole or in part at trial. *Compare* FED. R. CRIM. P. 15(e) with 18 U.S.C.A. § 3503(f) (Supp. 1971).

[92] 399 U.S. 149 (1970). *Dutton v. Evans*, 400 U.S. 74 (1970), was decided subsequent to the *Green* decision and has considerably confused the dimensions of constitutional confrontation. In *Evans* a co-conspirator of the defendant Evans made a casual remark to a prison inmate-employee implicating Evans as a participant in the murder conspiracy. Under a Georgia statutory exception to the hearsay rule, the inmate-employee was called to testify concerning the remark in the murder trial of Evans. Evans argued before the Supreme Court of the United States that the testimony in issue denied him the right to be confronted guaranteed by the sixth amendment. The Court in a 5-4 decision without an opinion of the Court (actually the split was 4-1-4, Mr. Justice Harlan concurring in result with the Chief Justice, Mr. Justice Stewart, Mr. Justice White, and Mr. Justice Blackmun, who also concurred separately with the Chief Justice) held that the testimony by the prison inmate about the co-conspirator's remark was admissible so far as constitutional confrontation was concerned. In a confusing opinion by Mr. Justice Stewart, who wrote for the bulk of the majority, the plurality of the Court determined that the testimony in question was only "peripheral"; and as limited to the implications of the co-conspirator's remark with regard to Evans' identity in the murder plot, the confrontation right was not denied because (1) the jury was warned by the "face" of the statement against giving it undue weight; (2) the co-conspirator's personal knowledge of the identity of the participants in the conspiracy was already "abundantly established"; (3) the possibility of faulty recollection is extreme; (4) the remark was spontaneous and against the conspirator's penal interest. *Id.* at 87-89. In a separate concurrence, Mr. Justice Blackmun declared his belief that the inclusion of the ques-

uncertainty whether the sixth amendment confrontation clause guaranteed a criminal defendant the right to confront witnesses testifying against him, as a trial right identical to the common law hearsay rule with its exceptions.[93] The constitutional right to confrontation has been defined as the opportunity to cross-examine adverse witnesses and to preclude depositions or *ex parte* affidavits from being used against the defendant.[94] Extra-judicial statements of witnesses have been held to be inadmissible at trial where the witness was unavailable for cross-examination at trial and there has been no effective cross-examination at the time that the testimony was elicited.[95] The Court, however, intimated before *Green* that such extra-judicial statements may have been admissible if subject to cross-examination at the time that they were given.[96] But with the decisions of *Barber v. Page*[97] and *Berger v. California*,[98] it appeared that the Supreme Court of the United States was implying that the only effective cross-examination meeting constitutional standards was before the ultimate trier of fact. In *Green*, the Court clarified the constitutional confrontation right, taking the position that a witness' testimony is constitutionally valid when either the witness has not been cross-examined at the time of the testimony but is available for cross-examination on this previous testimony at trial or the witness has been subject to full and effective cross-examination at the time the testimony was extracted and is unavailable to testify at trial. The power of the government to depose prospective witnesses under the limitations of § 3503 is clearly upheld by the latter ground for decision in *Green*. Furthermore, the requirement that the government disclose all of the statements made by the witness and held by the government protects the defendant's rights to an effective cross-examination at the deposition proceeding within the requirements of procedural due process of law.[99]

Permissible instances in § 3503(f) when extra-judicial statements may

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tioned testimony was harmless error if it was error at all. Mr. Justice Marshall, writing for the dissent, reasoned that the statement of a co-conspirator was so prejudicial that it could only be admitted if there was an opportunity to cross-examine the declarant. *Id.* at 110.

Since the full impact of the *Evans* decision upon constitutional confrontation is uncertain at this time, the basic rationale of the decision in *California v. Green*, *supra*, remains a viable precedent for the proposition that full and adequate cross-examination at the time that an extra-judicial statement is made satisfies the requirements of the sixth amendment right to confrontation.

[93] *Compare*, 5 J. WIGMORE, EVIDENCE § 1397 at 127 *with* 399 U.S. 149, 155-56 (1970).

[94] Mattox v. United States, 156 U.S. 237, 242-43 (1895); Douglas v. Alabama, 380 U.S. 415, 418 (1964).

[95] Pointer v. Texas, 380 U.S. 400 (1964); Douglas v. Alabama, 380 U.S. 415 (1964) (the unavailability of the witness stemmed from his refusal to answer any questions, declaring his right against self-incrimination).

[96] Pointer v. Texas, 380 U.S. 400 (1964); Douglas v. Alabama, 380 U.S. 415 (1964).

[97] 390 U.S. 719 (1968).

[98] 393 U.S. 314 (1969).

[99] Senate Hearings 373.

be used at trial seem to be a codification of the present case law on the unavailability of a witness to be cross-examined.[100] Since constitutional objections to government depositions seem to be adequately met by *California v. Green*,[101] governmental depositions seem to be an easy and effective way of bolstering the evidence-gathering forces against organized crime.

TITLE VII—LITIGATION CONCERNING SOURCES OF EVIDENCE[102]

In *Weeks v. United States*[103] the exclusionary rule was first formulated by the Supreme Court of the United States to deal with evidence that was obtained by a violation of the fourth amendment right to be secure against unreasonable searches and seizures. The Court reasoned that the judiciary should not sanction unlawful searches and seizures by allowing law enforcement agencies to secure convictions by utilizing evidence so acquired.[104] Furthermore, the use of unconstitutionally procured evidence effectively denied an individual of his fourth amendment rights.[105] The Court refined the implications and applications of the exclusionary rule in federal courts in the subsequent cases of *Silverthorne Lumber Co. v.*

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[100] Barber v. Page, 390 U.S. 719 (1968), indicates that a witness must be actually unavailable to testify at trial. This means that the government must have made a good faith effort to obtain the appearance of the witness at trial. The burden of proving the actual unavailability of witnesses has generally been placed upon the prosecution, *Wilson v. Bowie*, 408 F.2d 1105 (9th Cir. 1969).

[101] 399 U.S. 149 (1970).

[102] 18 U.S.C.A. § 3504 (Supp. 1971). The section reads as follows:

Litigation concerning sources of evidence.

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and

(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.

(b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

[103] 232 U.S. 383 (1914).

[104] *Id.* at 392.

[105] *Id.* at 398. *Accord*, Mapp v. Ohio, 367 U.S. 643 (1961) (the fourth amendment exclusionary rule applies to the states through the fourteenth amendment).

United States[106] and *Nardone v. United States*.[107] In *Silverthorne* the Court recognized that evidence obtained by exploiting information procured in a constitutionally unlawful manner was inadmissible in federal courts like the direct product of the illegal act. However, it was alternatively realized that the substance of impermissibly obtained evidence could become admissible if it was proved from an independent source.[108] Another limitation was placed upon the application of the exclusionary rule in *Nardone* where it was recognized that although a technical argument could make out a causal connection between the evidence obtained by the unlawful act and the government's proof such connection could have become so attenuated as to dissipate the taint and allow the government's proof to be used at trial.[109]

Other cases involving the exclusionary rule have held that private conversations, if illegally overheard, and their "fruits" are subject to motions to suppress[110] and that suppression of the product of an unconstitutional search can be successfully urged only by those whose rights were violated by the search and not by those aggrieved solely by the introduction of damaging evidence.[111] Therefore, in the context of wiretapping, electronic eavesdropping, and other forms of unauthorized electronic surveillance, a fourth amendment violation is constituted when (1) the evidence to be used for conviction has been acquired directly from the illegal activity or a product of the exploitation of the information acquired by the illegal activity, and (2) the overheard conversations involved the party asserting his constitutional rights or occurred on the premises of the asserting party whether or not that party participated in the conversations.[112]

As the scope of the application of the exclusionary rule expanded into the areas of illegally overheard conversations, the federal judiciary became faced with the problem of devising procedures to facilitate the processing of an increased number of motions to suppress evidence unconstitutionally

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[106] 251 U.S. 385 (1920).

[107] 308 U.S. 338 (1939).

[108] 251 U.S. 385, 392 (1920).

[109] 308 U.S. at 341. The Court went on to observe:

> . . . [T]he trial judge must give opportunity . . . to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.

For an example of the Court applying the attenuation doctrine in the form of a test—the evidence is either a product of the exploitation of the illegality or sufficiently distinct to be purged of the punery taint. *See* Wong Sun v. United States, 371 U.S. 471, 487-88 (1963).

[110] Katz v. United States, 389 U.S. 347 (1967) (the reach of the fourth amendment cannot turn upon the presence or absence of physical intrusion); Silverman v. United States, 365 U.S. 505 (1961) (conversations overheard because of unauthorized electronic surveillance carried out by physical intrusion are fruits of an illegal entry).

[111] Jones v. United States, 362 U.S. 257, 261 (1960); Wong Sun v. United States, 371 U.S. 471, 492 (1963).

[112] Alderman v. United States, 394 U.S. 165, 176 (1969).

tainted by fourth amendment violations. After meeting the two threshold issues of (1) whether or not the surveillance was illegal in a constitutional sense and (2) whether or not the movent has standing to assert a fourth amendment exclusionary rule claim, the movent has the burden to go forward with specific evidence of the tainted character of the government's proof.[113] To fulfill this burden of showing a causal relation between the government's unconstitutional act and its evidence, the movent must be informed of the contents of the government's surveillance records so that he may intelligently argue the unconstitutional taint of certain proof put by the government. However, the records of a particular surveillance may be voluminous and contain material that is irrelevant to the set of circumstances under litigation. Disclosure of the irrelevant records could be highly detrimental in several respects,[114] and the reluctance to reveal the substance of an entire surveillance record was in many ways well-founded.

In *Alderman v. United States*[115] the Supreme Court laid down the rule that *all* surveillance records as to which a movent has standing to object would be turned over to the movent without first being screened by the trial court to determine the arguable relevancy of certain portions of the record. The antecedent case of *Kalod v. United States*[116] had recognized that an *ex parte* determination of arguable relevancy was unacceptable in lieu of such a determination in an adversary proceeding. In *Alderman* the Court saw only full disclosure of all records as giving the movent his proper opportunity to produce evidence that the proof of his opponent was tainted by unconstitutional acts. The government in *Alderman* had argued that the surveillance records should be subjected to an *in camera* inspection by the trial judge who would determine the arguable relevancy of the records. The government reasoned that this procedure was necessary because the disclosure of an entire record had inherent dangers to the reputation or safety of individuals other than the parties to the litigation and conceivably unknown harm to the national security unless the government preferred dismissal of the action to protect the contents of the surveillance records. The Court, however, reasoned that the trial judge usually lacked either the time or the familiarity with the case to undertake the screening process in cases where the records may be massive and the margin of error too great.[117] Furthermore, the Court noted the utility of adversary proceedings in a large and complicated hearing that could avoid exhorbitant expenditure of judicial time and energy while not unduly pre-

[113] *Id.* at 183; Nardone v. United States, 308 U.S. 338, 341 (1939). The government, however, has the ultimate burden of persuasion to show that its evidence is not tainted. 394 U.S. 165, 183 (1969).

[114] McClellan, *The Organized Crime Act, supra* note 8, at 109.

[115] 394 U.S. 165 (1969).

[116] 390 U.S. 136 (1968).

[117] "[T]he trial judge . . . will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands." 394 U.S. 165, 184 (1969).

judicing others or the public interest. Finally, realizing that full disclosure at times could be prejudicial to non-litigants, the Court suggested that the trial judge could issue protective orders where appropriate to protect against public disclosure of confidential information.[118] The enactment of Title VII was in part a congressional reaction to the *Alderman* full disclosure rule.

Section 3504 (a) of 18 U.S.C.A.[119] creates a three-step process to regulate the procedure in motions to suppress in federal proceedings. At the outset the opponent of a claim that evidence is unconstitutionally tainted must affirm or deny the allegation that an unconstitutional or illegal surveillance took place.[120] If the claimed fourth amendment violation concerns allegations that the government's evidence was procured through exploitation of the unconstitutional or illegal act, the claim may not be considered if the act in question occurred more than five years before the event for which the movent is being prosecuted.[121] Such a five year time span represents a legislative finding that the relationship between the impermissible act of surveillance and the alleged unlawful act of the movant has become so attenuated by the lapse of time as to dissipate the taint of the impermissible conduct.[122] Whether the allegation in the claim of inadmissible evidence is based upon the theory that the evidence is the primary product of the impermissible act or the evidence is the product of the exploitation of the impermissible act, disclosure of information to the movent to aid him in determining if the evidence is inadmissible is not necessary unless it is relevant to the pending claim.[123] Such a legislative directive assumes that the trial court will have to make an *in camera* inspection of the surveillance records to determine what portion thereof is arguably relevant to the situation.

The justifications for the provisions on attenuation and disclosure basically follow the rationale of the government's argument for *in camera* screening in the *Alderman* case. In formulating the statute the drafters also took into account the use by criminals of motions to suppress as dilatory proceedings causing expense in terms of loss of manpower and inexpediency in the administration of justice.[124] In addition, the supporters of

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118 *Id.* at 185.

119 18 U.S.C.A. § 3504(a) (Supp. 1971). Further references in the text to the provisions of Title VII will be made to the appropriate subsection of § 3504.

120 18 U.S.C.A. § 3504(a)(1) (Supp. 1971).

121 18 U.S.C.A. § 3504(a)(3) (Supp. 1971).

122 *See* Nardone v. United States, 308 U.S. 338 (1939); letter from Will Wilson, Assistant Attorney General, to the Hon. Emanuel Cellar, Chairman, Committee on the Judiciary, House of Representatives, July 23, 1970 as contained in H.R. REP. NO. 1549, 91st Cong., 2nd Sess. (1970).

123 18 U.S.C.A. § 3504(a)(2) (Supp. 1971).

124 Letter from Will Wilson, *supra* note 122; McClellan, *The Organized Crime Act, supra* note 8, at 110, 132.

Title VII argued that protective orders were not adequate, and the trouble envisaged by the *Alderman* case of the unfamiliar judge attempting to screen a voluminous surveillance record would be solved by the use of federal magistrates carrying out the *in camera* screening.[125] On the other hand, the opponents of these amendments to the present exclusionary rule procedure contended that the provisions constituted a dilution of the fourth amendment right to be secure from unreasonable searches and seizures by undermining the deterrent effect of the exclusionary rule and encouraging illegal activities by law enforcement agencies.[126]

The difficulties underlying a constitutional analysis of subsection (a) (2) of Title VII of the statute begin with conflicting theories on the status of the exclusionary rule in relationship to the fourth amendment. It has been suggested in limiting the disclosure implementation of the exclusionary rule that the rule itself is only a means to an end of deterring fourth amendment violations, that it is not an absolute right to suppression, and that any application of the rule must be evaluated by a balancing process.[127] Such an analysis of the exclusionary rule gains support from *Linkletter v. Walker*[128] and *Desist v. United States*.[129] In both of these retroactivity cases, the analysis stressed heavily the deterrence purpose of the exclusionary rule, reasoning that deterrence would not be served properly by retroactive application of the rule in these situations. Further support for the proposition that the exclusionary rule is not a strict constitutional mandate is elicited from *Walder v. United States*,[130] a pre-*Mapp* opinion that held that the use of illegally seized evidence to impeach a defendant's credibility to be permissible. However, the Court explicitly stated that the government could not make affirmative use of the evidence unlawfully obtained.[131] Other more recent decisions seem to indicate support for the theory that the exclusionary rule is an integral part of the constitutional rights guaranteed by the fourth amendment and a conviction based on unconstitutional evidence is impermissible.[132] Even the *Alderman* opinion carries with it language of both the deterrence purpose of the exclusionary rule and the

[125] McClellan, *The Organized Crime Act, supra* note 8, at 125-28; letter from Will Wilson, *supra* note 122.

[126] A B C N Y REPORT 27-29 (1970).

[127] McClellan, *The Organized Crime Act, supra* note 8, at 112.

[128] 381 U.S. 618 (1965). The case held that *Mapp v. Ohio*, 367 U.S. 643 (1961), was not to be applied retroactively.

[129] 394 U.S. 244 (1969). The case held that *Katz v. United States*, 389 U.S. 347 (1969), was not to be applied retroactively.

[130] 347 U.S. 62 (1954).

[131] *Id.* at 65.

[132] "[T]he plain and unequivocal language of [the exclusionary rule] . . . to the effect that [the exclusionary rule] . . . is of constitutional origin, remains entirely undisturbed." Mapp v. Ohio, 367 U.S. 643, 649 (1961). *See Ker v. California*, 374 U.S. 23, 34 (1963) (states can develop workable rules governing searches and seizures provided the rules do not violate the constitutional proscription against unreasonable searches and seizures and the concomitant command that evidence illegally seized is inadmissible against one who has standing to complain).

concept that evidence unconstitutionally seized cannot be used to convict a party who has standing to object to the impermissible seizure.[133]

The inquiry into whether or not the exclusionary rule is an inseparable portion of the constitutional rights, though, is not the basic problem in determining the constitutionality of subsection (a)(2). Rather, the primary concern of the drafters and the opponents of the provision is whether the *Alderman* decision dictated a constitutional mandate or a supervisory policy over the federal judiciary. The language of the *Alderman* opinion is equivocal with regard to the question because nowhere does the Court explicitly state that the formulated rule is constitutionally based. The proponents of the subsection use the equivocal nature of the language to raise the theory that if an opinion can be read as based on constitutional grounds and as based upon non-constitutional (supervisory) grounds then the favored interpretation is that the Court did not reach the constitutional question.[134] Bolstering the assertion of a supervisory opinion is the language in the case referring to the practical aspects of the decision.[135] In addition, the experience of *Jencks v. United States*[136] and the subsequent Jencks Act[137] shows that previously the Court had decided that a practice involving the trial judge's determination of relevancy had been declared impermissible, only to have the rule changed by the Congress because it was based upon the Court's supervisory power. However, the language in the *Jencks* case was not as equivocal as that of the *Alderman* case. Furthermore, the criteria used in *Jencks* dealt with the requirements of "justice" and not with the implementation of a well-defined constitutional right.

The *Alderman* opinion in language and surrounding circumstances seems to present a stronger argument than *Jencks* that the basis of the decision was constitutionally mandated. If the purpose of the Court in *Alderman* was to avoid implementing the constitutional right,[138] the language in the opinion strongly indicates that the full disclosure rule has firm foundations in the constitutional right to have the opportunity to prove that the government's proof is unconstitutionally tainted.[139] In ad-

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133 *Compare* 394 U.S. 165, 174 (1969) *with* 394 U.S. 165, 175-76 (1969).

134 Peters v. Hobby, 349 U.S. 331, 338 (1955); see McClellan, *The Original Crime Act, supra* note 8, at 122-25.

135 394 U.S. 165, 184 (1969) (full disclosure would avoid exorbitant expenditure of judicial time and energy).

136 353 U.S. 657 (1957).

137 18 U.S.C. § 3500 (1958). The statute was constitutionally upheld in *Palermo v. United States*, 360 U.S. 343 (1959) (the previous rule was an exercise of the Court's power to prescribe procedure for the administration of justice in federal courts).

138 The central issue should not be whether the rule is supervisory or not, but rather does the rule avoid diminishing the implementation of the constitutional mandate. Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 191 (1969).

139 "Adversary proceedings. . .[guard] against the possibility that the trial judge. . .will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands." 394 U.S. 165, 184 (1969). *See House Hearings* 377-79. However, the quoted passage gives

dition to the supporting language in the opinion, the Court has determined that *in camera* inspection of surveillance records by the trial judge would be a sufficient safeguard of fourth amendment rights in the area of legality of the surveillance and standing to assert the constitutional claim.[140] Therefore, the conclusion can be drawn from the holdings in those cases regarding legality and standing that whereas *in camera* inspection is adequate to safeguard an individual's fourth amendment rights on those issues, the question of relevancy of surveillance records which is crucial to the application of the exclusionary rule cannot be satisfactorily protected by *in camera* inspection.

The statutory provisions in subsection (a)(2) that change the full disclosure rule of the *Alderman* case seem at least to be arguably contravening the alleged constitutional significance of that opinion. The statute, however, is vague enough on its face that the courts interpreting the provisions will be given some discretion in formulating procedures to discover the relevance of surveillance records in a way that may provide adequate safeguards to the implementation of fourth amendment rights.

In *Nardone v. United States*[141] it was recognized that the causal connection between the unconstitutional act and the alleged crime could have become so attenuated as to dissipate the taint of the impermissibility. Subsection (a)(3) represents a legislative determination that the doctrine of attenuation is automatically applicable after a five year lapse of time, conclusively precluding a movent from asserting that the evidence tending to prove his involvement is the product of the exploitation of that of a previous unconstitutional act. The justification for such a determination was extrapolated from the experience of the federal law enforcement agencies in dealing with suppression motions.[142] But constitutionally it seems that the provision suffers from a fatal overbreadth. In *Wong Sun v. United States*[143] the attenuation doctrine was applied to the situation where the defendant voluntarily made incriminating statements to the police in the matter of a few hours after he had been illegally arrested and released on his own recognizance. The Court rejected the "but for" test to identify the "fruit of the poisonous tree" and formulated the concept that evidence was "fruit" if it was produced from the exploitation of the primary illegality —connoting that affirmative action must be taken to uncover the evidence before it is considered a product of the exploitation. Subsection (a)(3), however, does not consider the affirmative aspect of the exploitation test

the hint of a suggestion that there may be methods other than full disclosure that could meet the standards of scrutiny demanded by the fourteenth amendment.

140 *See House Hearings* 378-79 (testimony of Professor Herman Schwartz, member of the faculty of the State University of New York at Buffalo, School of Law), Giordano v. United States, 394 U.S. 310 (1969); Taglianetti v. United States, 394 U.S. 315 (1969).

141 308 U.S. 338 (1939).

142 *See* letter from Will Wilson, *supra* note 122.

143 371 U.S. 471 (1963).

and merely formulates an automatic termination of any right to assert a violation of fourth amendment rights after five years. It may very well be true that most of the taint is dissipated after the five year period; but it is conceivable, especially in the area of long-term plans of organized crime, that the government's evidence in a given prosecution may be tainted by an illegal act of surveillance more than five years old. Such a contingency could cause the loss of a highly valued constitutional right that courts have worked so vigorously to protect against erosion and destruction. It is certainly true that attenuation could occur in a very short period as the circumstances in *Wong Sun* indicate. However, the blanket provision of subsection (a)(3) will probably be questioned as an unconstitutional limitation upon the assertion of a constitutional right.

It is uncertain to what extent subsections (a)(2) and (a)(3) will be tested in the courts. The applicability of the various provisions are limited by the terms contained therein. First, the provisions of subsection (b) state that subsection (a) is only applicable to litigation involving wiretapping and other forms of electronic surveillance.[144] Secondly, subsections (a)(2) and (a)(3) do not apply to a surveillance that occurred after June 19, 1968, the effective date of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[145] Hence, Title VII's alleged inroads into the area of the constitutionally commanded right to be secure from unreasonable searches and seizures may be sporadically tested before the courts if at all.

TITLE X

This title permits the United States attorney, in the prosecution of an accused for a federal felony, to file a notice with the court specifying that the defendant is a "dangerous special offender" as that term is defined in the act.[146] In such cases, if the defendant is convicted of the felony of which

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[144] The illegal types of surveillance are defined in 18 U.S.C.A. § 2510(5) (1968).

[145] 82 Stat. 211 (codified in scattered sections of 18 U.S.C.A.) (statute makes unauthorized electronic surveillance a serious crime).

[146] 18 U.S.C.A. § 3575(e). A defendant is a special offender for purposes of this section if—(1) the defendant has previously been convicted in courts of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof for two or more offenses committed on occasions different from one another and from such felony and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felony, and less than five years have elapsed between the commission of such felony and either the defendant's release, or parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous offense or another offense punishable by death or imprisonment in excess of one year under applicable laws of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof; or (2) the defendant committed such felony as part of a pattern of conduct which was

he is charged, the court will conduct a special hearing on the question of whether the defendant is in fact a "dangerous special offender." If such special status is shown by a "preponderance of the information" the court "shall" sentence the defendant to a term of imprisonment "not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony." A special sentence so imposed may be appealed either by the defendant or by the government, but the sentence so imposed may be increased only on an appeal taken by the government and after a hearing.

There have been attacks leveled against Title X indicating that it is violative of the constitutional requirement of due process and the prohibitions against double jeopardy and vagueness. However, the judiciary has long recognized that the same protections are not required in the sentencing process as in the process involved in the adjudication of guilt or innocence. Thus, the threshold issue is raised. "Is charging a defendant with being a "dangerous special offender" a charge of a separate criminal offense?" If answered in the affirmative, the arguments presented by the critics would be very persuasive. If answered in the negative, the arguments would lose much of their force. However, the negative answer would not foreclose absolutely a consideration of these constitutional arguments.

One definition of crime points to the consequences of the proceeding as they will affect the defendant's rights, and classifies as a crime that which is followed by criminal penalties.[147] A second definition of what constitutes a crime says that if the procedures used are those typically associated with a determination of criminal guilt, then that which they are employed to determine, is a crime.[148] Since an expanded criminal penalty is the consequence of being found to be a dangerous special offender, and the procedures used are akin to those associated with a determination of criminal guilt, one could argue that a finding as to special offender status may actually be denoting a crime. In addition, a few courts support the posi-

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criminal under applicable law of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

(3) such felony was, or the defendant committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.

. . . .

(f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant.

147 Pollock, *What's in a Name? The Problem of the Definition of Crime*, 1956 CRIM. L. REV. 792.

148 Williams, *The Definition of Crime*, 8 CURRENT LEGAL PROB. 107 (1955).

tion that habitual offender statutes actually define a crime. A federal district court in *Application of Boyd*[149] said:

> It appears to the Court the sheerest verbalism to say that a defendant convicted of being a habitual criminal is not convicted of an offense but merely fixed with a certain status, when the mandatory result of such conviction is life imprisonment without hope of parole.[150]

To sum up, the argument runs that since a determination of "dangerous special offender" status is made for all intents and purposes in a criminal proceeding, and since the penalty which follows the determination is a criminal sanction, what then is to distinguish the status of dangerous special offender from the crime of dangerous special offender?

The Supreme Court has previously considered the issue of whether recidivist statutes delineate a separate offense. In *Graham v. West Virginia*,[151] the Supreme Court viewed a recidivist determination as a distinct issue and stated ". . . it does not relate to the commission of the offense, but goes to the punishment only. . . ."[152] The Court concluded that ". . . there is no basis for the contention that the plaintiff in error has been put in double jeopardy or that any of his privileges or immunities as a citizen of the United States have been abridged."[153] When the Supreme Court again had an opportunity to consider West Virginia's habitual criminal statute in *Oyler v. Boles*,[154] the Court stated ". . . an habitual criminal charge does not state a separate offense. . . ."[155] These precedents would preclude further consideration on the question of whether the recidivist definition of special offender actually defines a separate offense. They would also appear to preclude further consideration as to the other two definitions of special offender. Persuasive authority that all the definitions of special offender are not separate crimes or offenses is provided by *Specht v. Patterson*.[156] The case dealt with a defendant convicted of the crime of indecent liberties under a Colorado statute that carried a maximum sentence of ten years. However he was sentenced under the Sex Offenders Act for an indeterminate term of from one day to life imprisonment. The Act could be applied if the trial court believed that a person convicted of specified sex offenses "if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." There the Court said:

> The Sex Offenders Act does not make the commission of a specified crime

149 189 F. Supp. 113 (M.D. Tenn. 1959).
150 *Id.* at 117.
151 224 U.S. 616 (1912).
152 *Id.* at 629.
153 *Id.* at 631.
154 368 U.S. 448 (1962).
155 *Id.* at 452.
156 386 U.S. 605 (1967).

> the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a new finding of fact . . . that was not an ingredient of the offense charged.
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> . . . .
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> Under Colorado's criminal procedure, here challenged, the invocation of the Sex Offenders Act means the making of a new charge leading to criminal punishment. *The case is not unlike those under recidivist statutes where an habitual criminal issue is a "distinct issue"* (*Graham v. West Virginia*, . . .)[157] (emphasis added).

The similarities of purpose and operation between the Sex Offenders Act and Title X are apparent. Therefore, it is significant that the Supreme Court noted the proceeding under the Sex Offenders Act is a separate proceeding to determine punishment and that *Graham v. West Virginia* was cited in support of the notion that it is a "distinct issue." Although *Graham v. West Virginia* was cited to support the Court's contention in regard to due process, it cannot be assumed that the Court overlooked the fact that *Graham* stands for the notion that a habitual offender charge is not only a distinct issue but also that ". . . it does not relate to the commission of the offense, but goes to the punishment only. . . ."[158] Thus, it would appear that Title X's definitions of special offender are not actually defining a separate offense.

This conclusion would then mean that allowing the government to appeal a decision of a district court that a defendant is not a "Dangerous special offender" is not violative of the double jeopardy clause of the fifth amendment.[159] However, the fact that "dangerous special offender" is not a separate offense does not close the double jeopardy issue. It arises in other contexts.

First, the professional offender and conspiracy offender definitions of special offender employ the phrase, "pattern of conduct criminal under applicable laws of any jurisdiction." The phrase is further defined in the Act as follows:

> . . . criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.[160]

It is not clear from the definition whether the reference to criminal acts is limited to convictions. Since the recidivist definition specifically requires prior "convictions," the absence of the word "conviction" from the "pat-

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[157] *Id.* at 608-610.

[158] 224 U.S. 616, 629 (1912).

[159] U.S. CONST. amend. V, ". . .nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

[160] 18 U.S.C.A. § 3575 (Supp. 1971).

tern" definition would indicate that Congress did not intend to limit criminal acts to convictions. Additionally, the Justice Department viewed this definition as not being limited to convictions. In a letter to the Chairman of the House Committee on the Judiciary, the Department wrote:

> It is designed to reach the professional criminal who is a repeating offender but who may not have a prior conviction record.[161]

If this is in fact what Congress intended, the problem is obvious. The government would introduce evidence of prior criminal conduct not amounting to convictions in support of its claim that the defendant is a dangerous special offender. If the district court found that the "information"[162] did not support the conclusion that the defendant had engaged in prior criminal acts, the government, under Title X, would be allowed to appeal this decision. The double jeopardy clause would be violated because, in effect, the government is being allowed to appeal a not guilty finding as to prior offenses. These prior criminal acts can only be classified as offenses as the use of the word "acts" suggests.

Additionally, allowing the government to show prior criminal acts not amounting to convictions poses a problem in regard to the burden of proof required. Since the government is attempting to show previous misconduct in order to extend the defendant's prison term by showing criminal acts for which there has been no prior conviction, it would seem that the government should have to prove such beyond a reasonable doubt rather than by a mere "preponderance of the information."[163]

Second, the double jeopardy issue arises in the context of allowing the government to appeal the *length* of the sentence imposed. The recent Supreme Court decision in *North Carolina v. Pearce*[164] appears to settle this issue however. In *Pearce*, the Supreme Court held that there is no constitutional prohibition against the imposition of a greater punishment on a second trial following a successful appeal by a defendant than that handed out on the first conviction. It should be noted that the Court was dealing with an increase in sentence after retrial rather than on appeal and that the Court required that the reasons for a higher sentence be based on the defendant's objective conduct *after* the original sentencing so that

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161 Letter from Will Wilson, Assistant Attorney General, to the Hon. Emanuel Cellar, Chairman, Committee on the Judiciary, House of Representatives, September 9, 1970 as contained in H.R. REP. NO. 91-1549, 91st Cong., 2d Sess. (1970).

162 18 U.S.C.A. § 3575(b) (Supp. 1971).

> . . .If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonmnt for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony.

163 *Id.*

164 395 U.S. 711 (1969).

there be no possibility of the defendant's being penalized for having taken his appeal. This requirement would not be applicable to an increase in length of sentence on appellate review under Title X because, unlike the *Pearce* situation, under Title X, it is only the affirmative action of the government, not the defendant's exercise of a statutory right, that brings the matter within the power of the appellate court to increase sentence length. Just what difference there is in the fact that *Pearce* involved a retrial and Title X involves an appeal remains to be decided. However, the distinction would appear to be one without a difference. Further, one of the critics of the Senate version of the Organized Crime Control Act, The Association of the Bar of the City of New York, opined that the *Pearce* case would allow a government appeal from the length of the sentence imposed.[165] Another consideration that the courts should keep in mind is the fact that many people are unhappy with the light sentences being handed out by trial courts. Consider the recommendation of the President's Crime Commission that:

> There must be some kind of supervision over those trial judges who, because of corruption, political considerations, or lack of knowledge, tend to mete out light sentences in cases involving organized crime management personnel. Consideration should therefore be given to allowing the prosecution the right of appeal regarding sentences of persons in management positions in an organized crime activity or group.[166]

Another major problem that must be confronted in regard to Title X deals with the issue of due process. It is apparent that Title X would not meet the due process requirements for a proceeding wherein the guilt or innocence as to a criminal offense is being determined. However, as has been previously pointed out, judicial precedent would indicate that a determination of "dangerous special offender" will not be regarded as a determination of a separate crime or offense, but a determination as to punishment only. Therefore, the concern is over what constitutional protections are required in a sentencing proceeding under the dangerous special offender provision. The issue centers around the facts that: (1) the trial judge may base his finding on a presentence report which would contain hearsay information; (2) the defendant may cross-examine only ". . . such witnesses as appear at the hearing;" and (3) "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[167] The Supreme Court has previously held in *Williams v. New York*[168] that the due process clause of the fourteenth amendment does not

[165] A B C N Y REPORT 51 (1970).

[166] THE CHALLENGE OF CRIME IN A FREE SOCIETY 203 (1967).

[167] 18 U.S.C. § 3577.

[168] 337 U.S. 241 (1949).

require that a person convicted be confronted with and permitted to cross-examine witnesses when a judge is determining the sentence to be imposed. This would appear to settle the issue as to due process. However, a more recent Supreme Court case, *Specht v. Patterson*,[169] may be read to require greater constitutional protections for a defendant involved in a "dangerous special offender" proceeding. The *Specht* case held that a person committed under a state sex offenders act in a post conviction proceeding ". . . be confronted with witnesses against him, [and] have the right to cross examine. . . ."[170] Senator McClellan distinguishes the *Specht* case with these words:

> *Specht* is inapplicable to title X, since the post conviction allegations in the *Specht* case were held to be a new charge, separate and distinct from the criminal conviction which triggered the sex offender proceedings. In title X, on the other hand, the dangerous special offender criteria are facts which merely aggravate the penalty for an offense.[171]

However, as the New York City bar committee noted, under both the Sex Offenders Act and the habitual criminal statutes, the same finding of fact —that the defendant constitutes a threat to the public—has to be made and the effect—additional incarceration—is the same.[172] The Justice Department, nonetheless, wrote:

> It appears appropriate to distinguish between a proceeding which is based upon a new and distinct criminal charge, and one in which an imposition of an enhanced sentence is "a distinct issue."[173]

However, the Department failed to state why it is appropriate to make this distinction. Further, it appears that the *Specht* case did not really distinguish the two, but actually said they are "not unlike."[174]

Although upholding the rule in the *Williams* case, the Court said:

> We adhere to *Williams v. New York, supra*; but we decline the invitation to extend it to this radically different situation. These commitment proceedings . . . are subject both to the Equal Protection Clause of the Fourteenth Amendment . . . and to the Due Process Clause.[175]

The Court did not specifically set out why the proceedings in *Specht* were radically different. As pointed out above, the similarities in purpose and effect in the Sex Offenders Act and Title X would indicate that Title X

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169 386 U.S. 605 (1967).

170 *Id.* at 610.

171 McClellan, *The Organized Crime Act, supra* note 8, at 164.

172 A B C N Y REPORT 45-46 n.78 (1970).

173 Letter from Will Wilson, Assistant Attorney General, to the Hon. Emanuel Cellar, Committee on the Judiciary, House of Representatives, September 9, 1970 as contained in H.R. REP. NO. 91-1549, 91st Cong., 2nd Sess. (1970).

174 386 U.S. 610 (1967).

175 *Id.* at 608.

is also "radically different" in the very same way as the Sex Offenders Act and therefore subject to the due process requirements set out in *Specht*.

In reference to the terms employed in the Senate version of Title X, Senator McClellan argued that since Title X was not a substantive criminal prohibition but only a legislatively specified criteria for sentencing, it need not have the specificity and preciseness required of substantive criminal statutes.[176] However, Title X is unique in that it goes beyond the ordinary sentencing procedure and different criteria are considered when determining whether the defendant should have his liberty deprived for a greater number of years. Since a defendant's liberty is likely to be deprived for a greater number of years, it would seem then that the criteria used to make this determination should be constitutionally precise. Support for this notion is provided by the case of *Minnesota v. Probate Court*.[177] There, a state statute provided that persons could be subjected to a proceeding akin to lunacy proceedings with a view to restraint if the person was proven to be a psychopathic personality. The statute, as construed by the state court, called for evidence of "past conduct pointing to probable consequences."[178] The Supreme Court sustained the statute since "[t]his construction of the statute destroys the contention that it is too vague and indefinite to constitute valid legislation."[179] Implicit in this statement is the notion that the commitment statute could not be vague or indefinite. Logically, this same requirement would seem to be applicable to Title X. *Minnesota v. Probate Court* would also indicate that some of the terms employed in Title X are not vague. As Senator McClellan has pointed out, Title X requires proof of past conduct by requiring that the defendant is either a recidivist or has been engaged in a pattern of criminal conduct and it requires proof of "probable consequences" by requiring that the defendant be found to be dangerous.[180]

The terms employed in the Senate version of Title X were criticized for being vague.[181] However the House amended the Title and included some definitions suggested by the American Boys Association[182] to make more specific the terms, "Substantial source of income," "in which he manifested special skill or expertise," and "pattern of conduct."[183] Combining

[176] McClellan, *The Organized Crime Act, supra* note 8 at 153.

[177] 309 U.S. 270 (1940).

[178] *Id.* at 274.

[179] *Id.*

[180] McClellan, *The Organized Crime Act, supra* note 8, at 157.

[181] A B C N Y REPORT 48 (1970).

[182] *House Hearings* at 696.

[183] 18 U.S.C.A. 3575(e) (Supp. 1971).

> . . .
> . . . For purposes of paragraph (2) of this subsection, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and a fifty-week year, without reference to exceptions, under section 6(a)(1) of the Fair Labor Standards Act of 1938

these expanded definitions with the case of *Minnesota v. Probate Court* would lead one to conclude that the terms and definitions employed in Title X are not unconstitutionally vague.

Title X presents another problem of constitutional dimensions in light of the case of *Robinson v. California*.[184] There the Supreme Court held that a state statute which imprisons a person afflicted with narcotic addiction inflicts a cruel and unusual punishment. There the Court was dealing ". . . with a statute which makes the 'status' of narcotic addiction a criminal offense. . . ."[185] Thus, the argument would run that being of the status of a "dangerous special offender" would prevent the government from imposing increased sentences. However, there are two reasons why it is unlikely the *Robinson* rationale would apply to Title X. First, as it has already been pointed out, judicial precedent would indicate that Title X does not delineate a separate offense, but rather deals with sentencing criteria only. Second, even if the "dangerous special offender" provision is regarded as a separate offense, under *Powell v. Texas*[186] it is likely to be upheld since proof as to past conduct is an additional requirement.

Another problem, not of a constitutional nature, but still of some major significance deals with the discretion given the prosecutor in filing notice as to special offender status. The statute provides that the attorney for the United States *may* file such notice. It is not obligatory. This opens up the possibilities for plea bargaining in the federal criminal process and abuses by the federal prosecutors. Title X provides the prosecutor with a useful tool to coerce guilty pleas out of those that may or may not fall within the special offender class.

CONCLUSION

The Organized Crime Control Act provides the federal authorities with effective and much needed tools to deal with the challenge of organized crime in our society. In seeking to balance the competing inter-

(52 Stat. 1602, as amended 80 Stat. 838) and as hereafter amended, for an employee engaged in commerce or in the production of goods for commerce, and which for the same period exceeds fifty percent of the defendant's declared adjusted gross income under section 62 of the Internal Revenue Act of 1954 (68A Stat. 17, as amended 83 Stat. 655), and as hereafter amended. For purposes of paragraph (2) of this subsection, special skill or expertise in criminal conduct includes unusual knowledge, judgment or ability, including manual dexterity, facilitating the initiation, organizing, planning, financing, direction, management, supervision, execution or concealment of criminal conduct, the enlistment of accomplices in such conduct, the escape from detection or apprehension for such conduct, or the disposition of the fruits or proceeds of such conduct. For purposes of paragraphs (2) and (3) of this subsection, criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

184 370 U.S. 660 (1962).

185 *Id.* at 666.

186 392 U.S. 514 (1968).

ests of substantive rights and effective administration of justice, the Congress has drafted the legislation well. In many respects, it is responsive to the recommendations made by various legally oriented bodies. This is, of itself, indicative that those provisions of the Act should pass constitutional muster. However, there are some provisions that pose a threat of slight impingement of constitutional rights and therefore are susceptible to being rejected by the courts. But that is not enough of a reason to reject entirely this innovative approach to criminal legislation taken by the Congress. It cannot be forgotten that there is a need to eradicate the pervasiveness of organized crime and the Organized Crime Control Act provides the means.

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